STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF:

PROPOSED AMENDMENTS TO STANDARDS FOR INTERSTATE AND INTRASTATE SURFACE WATERS, 20.6.4 NMAC **No. WQCC 20-51 (R)**

TRIAD NATIONAL SECURITY, LLC
AND THE UNITED STATES DEPARTMENT OF ENERGY'S
RESPONSE TO AMIGOS BRAVOS' DECEMBER 9, 2021 MOTION TO STRIKE

Triad National Security, LLC and the United States Department of Energy, National Nuclear Security Administration (collectively "LANL") hereby submit their response in opposition to Amigos Bravos' Motion to Strike, filed on December 9, 2021 ("Motion"). For the reasons discussed below, the Motion is improper and should be denied.

I. Introduction

Amigos Bravos' Motion is without merit and amounts to nothing more than an improper and untimely attempt to invoke the last word and respond to LANL's post-hearing submittals. LANL's post-hearing submittals fully comply with the governing regulations and the Hearing Officer's procedural orders in this matter. Under 20.1.6.304 NMAC, the Hearing Officer "may allow the record to remain open for a reasonable period of time following the conclusion of the hearing for written submission of **additional evidence, comments and arguments, revised proposed rule language, and proposed statements of reasons**." 20.1.6.304 NMAC (emphasis added). Pursuant to that authority, the Hearing Officer kept the record open in this matter post-hearing and instructed the parties to file post-hearing submittals within 45 days after notice of the Water Quality Control Commission's ("WQCC" or "Commission") receipt of the hearing transcript. *See* Procedural Order, dated November 11, 2020; Amended Procedural Order, dated

October 26, 2021. LANL timely submitted its post-hearing submittals, including its closing argument, proposed statement of reasons, and final proposed amendments on September 24, 2021. In those submittals, LANL included revised proposed rule language and additional argument in support of its proposals—as is expressly authorized by 20.1.6.304 NMAC.[1]

The Motion requests that the Hearing Officer strike: (1) LANL's revised proposed language to amend 20.6.4.14(A) NMAC, *see* Exhibit A, LANL's Final Proposed Amendments to 20.6.4 NMAC at 7-8 ("LANL's Final Proposed Amendments"); and (2) a reference to EPA regulation 40 C.F.R. § 122.44(i)(1)(iv) in LANL's Proposed Statement of Reasons, *see* Exhibit B, LANL's Proposed Statement of Reasons at 111 ("LANL's Proposed Statement of Reasons"). Yet, Amigos Bravos cites no authority upon which the Hearing Officer can or should consider striking these portions of LANL's post-hearing submittals. Nor does any Commission regulation or order provide authority for the Motion. *See generally* 20.1.6 NMAC. LANL's post-hearing submittals comply with 20.1.6.304 NMAC, which expressly authorizes the submittal of revised proposed rule language and additional argument. *See* 20.1.6.304 NMAC. Moreover, LANL has already independently corrected the misquotation of 40 C.F.R. § 122.44(i)(1)(iv) on page 111 of LANL's Proposed Statement of Reasons, both in hearing testimony and through LANL's filing of a Notice of Errata. There is simply no basis for the Hearing Officer to strike any portion of LANL's post-hearing submittals.

Furthermore, to the extent Amigos Bravos' Motion is an attempt to invoke New Mexico Rule of Civil Procedure 1-0012(F) NMRA ("Rule 12(F)"), that attempt is fatally flawed in several additional respects. Rule 12(F) is a rule of civil procedure that authorizes a district court

[1] Indeed, other parties did the same. NMED's closing argument, for instance, adopts new proposed rule language after consideration of the testimony made during the hearing. *See e.g.*, NMED Closing Argument and Proposed Statement of Reasons at pp.18-19. Apparently, Amigos Bravos agreed with those changes as it did not file a motion to strike these new proposed rule changes.

to strike from a pleading any redundant, immaterial, impertinent, or scandalous matter upon motion made within 30 days of the date of service of the pleading at issue. *See* Rule 12(F). Here, a Rule 12(F) motion to strike would fail as a matter of law because: (1) the rules of civil procedure do not apply to rulemaking hearings before the Commission; (2) LANL's post-hearing submittals are not "pleadings," even by analogy; (3) Amigos Bravos has not identified any redundant, immaterial, impertinent, or scandalous matter within LANL's post-hearing submittals; and (4) the Motion was not filed with 30 days of the date LANL filed its post-hearing submittals.

Stripped of any prospect of success, the true purpose of Amigos Bravos' Motion appears to be to respond to LANL's post-hearing submittals. Neither the Commission's rulemaking regulations nor the Hearing Officer's procedural orders provide the parties with the opportunity to submit argumentative briefing in response to the other parties' post-hearing submittals. The Hearing Officer should not entertain Amigos Bravos' attempt to do just that in the guise of a motion to strike.

The Motion is improper, wasteful, and should be denied. To hold otherwise, would only invite additional argumentative briefing from each of the parties to this Triennial Review.

II. Legal Standard

As discussed above, the governing regulations expressly contemplate and allow for post-hearing submissions of additional argument and revised proposals. 20.1.6.304 NMAC provides that: "[t]he hearing officer may allow the **record to remain open** for a reasonable period of time following the conclusion of the hearing for written submission of **additional evidence, comments and arguments, revised proposed rule language, and proposed statements of reasons**." 20.1.6.304 NMAC (emphasis added). The procedural rules expressly provide that

post-hearing submittals are part of the Hearing Record for the Commission to consider. *See* 20.1.6.7(Q) NMAC (defining the hearing record to include "all documents related to the hearing and received or generated by the commission prior to the beginning, **or after the conclusion**, of the hearing, including, but not limited to . . . **post hearing submissions**") (emphasis added).

The Commission's regulations do not provide authority for a motion to strike another party's post-hearing submittals. *See generally* 20.1.6 NMAC. Rather, a motion to strike is a type of motion provided for by the New Mexico Rules of Civil Procedure that allows a **district court** to "order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter," upon a motion made within 30 days of service of the pleading at issue. Rule 12(F). However, the parties' post-hearing submittals are not pleadings, and the rules of civil procedures do not apply to rulemaking hearings before the Commission. Rule 1-007(A) NMRA (defining the types of pleadings); 20.1.6.300 NMAC ("the rules of civil procedure and the rules of evidence shall not apply").

Even if a motion to strike could be raised in this rulemaking proceeding, motions to strike are considered disfavored and are rarely granted. *See Young v. Hartford Casualty Ins. Co.*, 503 F. Supp. 3d 1125, 1170 (D.N.M. 2020) ("Striking a pleading or part of a pleading is a drastic remedy and because a motion to strike may often be made as a dilatory tactic, motions to strike under Rule 12(f) generally are disfavored.").[2] That is because, as discussed in *Young*, motions to strike often amount to cosmetic "time wasters":

[2] The New Mexico Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure, and the substance of Rule 1-0012(F) NMRA is virtually identical to its federal counterpart, Federal Rule of Civil Procedure 12(f). Accordingly, New Mexico courts have recognized that federal court interpretations of the Federal Rules of Civil Procedure rules are persuasive authority for the interpretation of New Mexico's Rules of Civil Procedure. *See, e.g., Albuquerque Redi-Mix, Inc. v. Scottsdale Ins. Co.*, 2007-NMSC-51, ¶ 9, 142 N.M. 527; *Romero v. Philip Morris Inc.*, 2005-NMCA-35, ¶ 35, 137 N.M. 229.

> The district court possesses considerable discretion in disposing of a Rule 12(f) motion to strike redundant, impertinent, immaterial, or scandalous matter. However, because federal judges have made it clear, in numerous opinions they have rendered in many substantive contexts, that Rule 12(f) **motions to strike** on any of these grounds **are not favored, often being considered purely cosmetic or "time wasters," there appears to be general judicial agreement, as reflected in the extensive case law on the subject, that they should be denied unless the challenged allegations have no possible relation or logical connection to the subject matter of the controversy** . . . .

Young, 503 F. Supp. 3d 1169-70 (citing 5C C. Wright & A. Miller, Federal Practice & Procedure § 1382, at 433-36 (3d. ed. 2004)) (emphasis added). Accordingly, a motion to strike is generally only proper when a pleading is "replete with redundant, immaterial, impertinent and scandalous matter," and where a party demonstrates that it will "be prejudiced in [its] efforts to defend" itself without the relief requested. *Peoples v. Peoples*, 1963-NMSC-067, ¶ 18, 72 N.M. 64.

III. Argument

A. The Motion Must be Denied Because the Governing Regulations Expressly Allow for LANL's Final Proposed Amendments and the Misquote of an EPA Regulation Has Already Been Corrected in Testimony and LANL's Second Notice of Errata

Amigos Bravos' position that LANL's post-hearing revisions to proposed rule changes are not timely and must be stricken is foreclosed by the express language in the Commission's regulations. 20.1.6.304 NMAC expressly authorizes the Hearing Officer to "allow the record to remain open" post-hearing for the written submission of "additional evidence, comments and arguments, **revised proposed rule language**, and proposed statements of reasons." 20.1.6.304 NMAC (emphasis added). There is no dispute that the Hearing Officer, pursuant to that authority, has allowed for the submission of post-hearing briefing, including revisions to proposed rule language—the very provisions that Amigos Bravos has now moved the Hearing

Officer to strike.[3] Amigos Bravos' request to strike revised proposed rule language in LANL's post-hearing submittal is contrary to law and the express directive from the Hearing Officer, and should not be considered.

Amigos Bravos argues that LANL's post-hearing arguments and proposals must be supported by "substantial evidence" already in the record. That is not accurate. While the Commission's ultimate decision must be supported by "substantial evidence" to survive a petition for judicial review, *see* NMSA 1978, Section 74-6-7(B) (1993), there is no requirement that arguments and proposals contained in a parties' post-hearing submittals be supported by "substantial evidence" already in the record. Indeed, the whole purpose of the post-hearing submittals is to provide additional evidence, additional argument, revised proposed rule language, and proposed statements of reason for the Commission to consider. *See* 20.1.6.304 NMAC. Both the parties' pre- and post-hearing submittals are considered part of the same, single record in this proceeding. *See* 20.1.6.7(Q) NMAC (defining the record to include "all documents related to the hearing and received or generated by the commission prior to the beginning, or after the conclusion, of the hearing, including, but not limited to . . . post hearing submissions"). LANL's revised proposal for 20.4.6.14(A) NMAC is not a "late-filed amendment," as Amigos Bravos repeatedly contends, it is "revised proposed rule language," which is expressly contemplated and authorized by 20.1.6.304 NMAC.

Furthermore, LANL is not the only party to have submitted revised proposed rule language in its post-hearing submittals. NMED submitted revised proposed rule language with its proposed statement of reasons. *See* NMED Closing Argument and Proposed Statement of

[3] The Commission conferred the Hearing Officer with all the powers and duties prescribed or delegated under 20.1.6 NMAC, including taking any other actions authorized by 20.1.6 NMAC that the Hearing Officer deems appropriate. *See* Order for Hearing and Appointment of Hearing Officer, WQCC No. 20-51(R) (October 19, 2020).

Reasons at 10 ("NMED's final proposed changes to 20.6.4 NMAC, **including post-hearing edits**, are included as NMED Exhibit 141 to this Proposed Statement of Reasons) (emphasis added). In fact, NMED "made a number of post-hearing changes and edits to its proposed amendments to 20.6.4 NMAC," including revisions to the proposed language for a dozen different sections and subsections of 20.6.4 NMAC. *Id.* at 11. Tellingly, Amigos Bravos has not filed a motion to strike NMED's revised proposed rule language, presumably because Amigos Bravos agrees with NMED's revisions.

With respect to Amigos Bravos' allegation that LANL misquoted an EPA regulation on page 111 of LANL's Proposed Statement of Reasons, LANL has already acknowledged and corrected this error through its Second Notice of Errata. *See* Hrg. Tr., Vol. III, 787:21-788:4 (Toll); LANL's Second Notice of Errata to LANL's Closing Argument, filed December 12, 2021 ("Second Notice of Errata"). Amigos Bravos argues that the mistaken quotation by LANL witness Dr. Toll was a misrepresentation of the rule and material. *See* Motion at 2. However, Dr. Toll explained on the hearing record, in response to questioning from Ms. Fox, that even if it was not a direct quote of the current regulation, it was a paraphrase of the requirements. Hrg. Tr., Vol. III, 788:1-4 (Toll). On December 10, 2021, LANL filed its Second Notice of Errata to correct this error in its post-hearing brief. *See* LANL's Second Notice of Errata. Given that LANL has corrected this error, thereby obviating any fleeting risk of misrepresentation, the present Motion is unnecessary and should be denied.

B. LANL's Post-Hearing Submittals Are Not Pleadings That May be Stricken Under Rule 12(F), Even if that Rule Applied to this Proceeding.

The Motion identifies no authority to strike any portion of LANL's post-hearing submittals. The Motion cites 20.1.6.207(C) NMAC, but that regulation does not authorize a party to file a motion to strike another party's written submissions to the Hearing Officer. As

discussed above, a motion to strike is a type of motion provided for by the Rules of Civil Procedure that allows a district court to "order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." *See* Rule 12(F). However, the Rules of Civil Procedure do not apply to rulemaking hearings before the WQCC. *Compare* 20.1.6.300 NMAC (WQCC rulemaking rules) *with* 20.1.3.8 NMAC (WQCC adjudicatory rules, which provide that "[i]n the absence of a specific provision in this part governing an action, the commission may look to the New Mexico Rules of Civil Procedure, SCRA 1986, 1-001 to 1-102 . . . for guidance.").

Moreover, even if Rule 12(F) could be applied to this proceeding, the Motion must be denied because a motion to strike is only proper to strike material from **a pleading**. *See* Rule 12(F). LANL's post-hearing submittals are not "pleadings," and therefore, they are not the proper subject of a motion to strike. *See* Rule 1-007(a) NMRA (defining the types of pleadings); *Trujillo v. Bd. of Educ. of Albuquerque Pub. Sch*., 230 F.R.D. 657, 660 (D.N.M. 2005) ("Under rule 7(a), the complaint, answer and reply constitute the pleadings. Motions and other papers are not pleadings."). In fact, courts frequently deny attempts to strike material from another parties' arguments and briefing, just as Amigos Bravos attempts to do here. *See, e.g.*, *Trujillo*, 230 F.R.D. at 660 (denying motion to strike another party's brief because the brief is not a pleading); *see also* 2 James Wm. Moore et al., Moore's Federal Practice § 12.37[2] (3d ed. 2014) ("Only material included in a 'pleading' may be the subject of a motion to strike, and courts have been unwilling to construe the term broadly."). Thus, for this reason as well, Amigos Bravos' Motion fails as a matter of law and must be denied.

C. The Motion Must be Denied Because it Fails to Identify Any Redundant, Immaterial, Impertinent and Scandalous Matter Within LANL's Post-Hearing Submittals.

The Motion also fails to identify any "redundant, immaterial, impertinent or scandalous matter." *See* Rule 12(F). Under Rule 12(F), matters are considered immaterial "if they have no possible bearing on the controversy." *Jenkins v. City of Las Vegas*, 333 F.R.D. 544, 548 (D.N.M. 2019) (citations omitted). Meanwhile, "impertinent matter consists of statements that do not pertain, and are not necessary, to the issues in question." *Id.* Finally, "scandalous matter is that which improperly casts a derogatory light on someone, most typically on a party to the action. But to be scandalous, a statement must go beyond offending the sensibilities of the objecting party *if* the challenged allegations describe acts or events that are relevant to the action." *Id.* Furthermore, a motion to strike is generally only proper when a pleading is "**replete** with redundant, immaterial, impertinent and scandalous matter." *Peoples*, 1963-NMSC-067, ¶ 18 (emphasis added).

The Motion raises two issues, neither of which are redundant, immaterial, impertinent, or scandalous. First, Amigos Bravos takes issue with LANL's revision of its prior proposal to amend 20.6.4.14(A) NMAC (Sampling and Analysis). During the hearing, some parties expressed concern about LANL's proposal, under 20.6.4.14(A) NMAC that 40 C.F.R. Part 136 approved methods should be used to determine compliance with the WQS and in Section 401 certifications under the federal Clean Water Act. Specifically, the parties expressed concern about how this proposal would operate for pollutants for which no Part 136 method had been approved. After considering that testimony, LANL revised its proposal to add the following language: "[i]n cases of pollutants for which there are no approved methods under 40 C.F.R. Part 136, analyses shall be conducted according to a test procedure specified in the applicable permit or 401 certification." *See* LANL's Final Proposed Amendments at 7. The revision is intended to clarify LANL's proposal, and to conform New Mexico WQS requirements for analytical

methods and use of analytical methods for compliance purposes to federal law. *See* LANL's Proposed Statement of Reasons at 46.[4] Rather than being redundant, immaterial, impertinent, or scandalous, LANL's revisions reflects the fact that LANL was open-minded, listened to the concerns expressed during the Triennial Review hearing, and modified its proposal it response to those concerns. The ability to modify regulatory proposals in response to public comments goes to the very heart of a successful public hearing and rulemaking process.

Second, Amigos Bravos alleges that an EPA regulation was misquoted on page 111 of LANL's Proposed Statement of Reasons. A single misquote is not redundant, immaterial, impertinent, or scandalous, but the issue has already been corrected through LANL's filing of a Second Notice of Errata. There is no risk, therefore, that Amigos Bravos will be prejudiced at all by the fleeting error. *See Peoples*, 1963-NMSC-067, ¶ 18 (to prevail on a motion to strike, a party must demonstrate that it will "be prejudiced in [its] efforts to defend.").

Rather than raising any real complaint of "redundant, immaterial, impertinent or scandalous matter," it appears that Amigos Bravos is attempting to use the Motion to supplement its closing arguments and respond to LANL's closing arguments. Unsurprisingly, Amigos Bravos' position is, as it was in the Triennial Review proceeding, that LANL's proposals should not be adopted. The Hearing Officer's authorization for post-hearing submittals did not provide for a party to submit responses in opposition to another party's arguments and submittals. The Hearing Officer should not allow Amigos Bravos to use its Motion as a vehicle to make arguments not authorized by the procedural rules in this matter.

D. The Motion Must be Denied Because it is Untimely and Would Only Invite Future Wasteful Briefing.

[4] 40 C.F.R. §122.44(h)(1)(iv)(B) provides "In the case of pollutants or pollutant parameters for which there are no approved methods under 40 CFR Part 136 . . . monitoring shall be conducted according to a test procedure specified in the permit for such pollutants or pollutant parameters."

The Motion is not timely and should not be considered. Amigos Bravos moves to strike certain documents that were filed with the Commission for inclusion in the record on September 24, 2021, nearly three months ago. Rule 12(F) requires that, to be timely, a motion to strike must be filed within 30 days of the date of service of the pleading at issue. LANL's post-hearing submittals are not pleadings, but even if they were, Rule 12(F)'s deadline to file motion to strike has long since expired.

The Commission's regulations do not expressly address timing for motions practice before a Hearing Officer, but the established practice requires that a motion must be brought as close as possible in time the date the movant became aware of the ground for the motion. *See, e.g.,* 1.2.2.12(A)(1) NMAC (Public Regulation Commission Rule stating "The Commission discourages any delay in filing of a motion once grounds for the motion are known to the movant."). Here, Amigos Bravos was aware of the "grounds" for this motion at the time the LANL's post-hearing submittals were filed, yet waited, without reason, for nearly three months after the documents were filed, over a month after the Hearing Officer's Report was issued, and after the deadline to file exceptions to the Report had passed to file its Motion. The Motion is untimely and should not be considered.

Finally, to entertain Amigos Bravos' untimely Motion, at this late stage of the proceedings, would signal that all parties to this Triennial Review may submit argumentative briefing in response to the each other parties' post-hearing submittals, provided the Motion is made under the guise of a motion to strike. Setting such a precedent would invite wasteful briefing and would serve only to further prolong these proceedings.

IV. Conclusion

The Motion is without merit and should not be considered. First, Amigos Bravos' veiled attempt to respond to or rebut LANL's post hearing submittals through a Motion to Strike is contrary to law and regulation. Moreover, the substantive material Amigos Bravos seeks to strike, LANL's post-hearing submissions, including additional comments, arguments, and revised proposed rule language, is exactly the material identified under the Commission's regulations for post hearing submissions, and was timely submitted by LANL in accordance with the Hearing Examiner's procedural schedule. LANL also independently corrected the misquotation of an EPA regulation in its Second Notice of Errata and explained that while the quotation marks were not accurate, the description of the regulation's substance was correct. For these reasons the Motion is without merit and should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2021, a true and correct copy of the foregoing ***Triad National Security, LLC and the United States Department of Energy's Response to Amigos Bravos' December 9, 2021 Motion to Strike*** was served via electronic mail to the following:

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